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CASE NOTE

STANDING ALONE: THE FIGHT TO GET CITIZEN SUITS UNDER THE CLEAN WATER ACT INTO THE COURTS.

Ailor v. City of Maynardville[1]

I. INTRODUCTION

Since many illegal acts remain unknown, the government cannot always enforce the laws of this nation. Perhaps more troubling is the fact that even when these illegal acts are known, the cost of litigation often prevents the government from taking legal action against every single violator. These grim realities have special consequences when the environment is concerned, where pollution that goes unpunished can have serious health implications for people and animals alike. Recognizing that private citizens can be a valuable asset to the enforcement of environmental laws, Congress passed Section 505 of the Clean Water Act (CWA), which allows a citizen to bring a lawsuit against anyone "who is alleged to be in violation" of the act.[2] However, because the act purports to allow nearly anyone to bring suit, the constitutional doctrines of standing and mootness are often implicated. The effect is that in reality, courts have interpreted the rules of standing and mootness in a way that keeps these citizen-suits out of court.

In *Ailor v. City of Maynardville*, the Sixth Circuit was given an opportunity to interpret the doctrines of standing and mootness in a way that would not keep viable claims by citizen-plaintiffs out of court.[3] In that case, the court addressed the issue of whether two citizen-plaintiffs had standing to bring their claims, and if they did, whether their claims were mooted by a polluter's voluntary cessation.[4] This note explores how the courts have traditionally handled such cases and argues that, in light of the purpose of citizen-suits and how the rules of standing and mootness grant courts discretion in their interpretation, tribunals should do what they can to ensure that citizen suits are heard.

II. FACTS AND HOLDING

In the early 1990s, the City of Maynardville ("City") owned and operated a sewage treatment plant located along Bull Run Creek in Union County, Tennessee.[5] On occasion, the plant would overflow and discharge raw sewage into the creek in violation of its National Pollutant Discharge Elimination System ("NPDES") permit.[6] The Tennessee Department of Environment and Conservation ("TDEC") began enforcement proceedings against the City in 1993 because of the plant's repeated violations.[7] On November 16, 1993, the Commissioner of the TDEC concluded that the City committed 148 permit violations within a two year span.[8] After finding that the City had violated two Tennessee statutes,[9] the Commissioner ordered the City to: (1) initiate a collection system rehabilitation program: (2) submit an Industrial User Survey; (3) bring the

[1] 368 F.3d 587 (6th Cir. 2004).
[2] 33 U.S.C. § 1365(a)(1) (2000).
[3] *Ailor*, 368 F.3d at 587.
[4] *Ailor*, 368 F.3d at 587.
[5] *Id.* at 591.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] TENN. CODE ANN. §§ 69-3-108, -114 (2003).

plant into compliance with the Clean Water Act ("CWA") and the NPDES permit; and (4) pay a $25,000 civil penalty to the United States Treasury.[10]

After receiving the Commissioner's order, the City appealed to the Tennessee Water Quality Control Board ("Board").[11] After hearings, the Board entered an Agreed Order on July 18, 1995.[12] In an effort to get the plant into compliance with its NPDES permit, the Agreed Order required the City to submit: (1) a correction action plan; (2) an engineering report; and (3) plans and specifications for the expansion of the plant.[13] The order also stipulated that the City pay a civil penalty of $1,875 and an additional $16,875 if it failed to comply with the order.[14] After spending 1.7 million dollars to comply with the order, the City's new wastewater treatment plant went on line in November, 2000.[15]

On January 30, 1998, while the City was trying to comply with the Board's order, Harry Ailor and Betty Lynch, landowners downstream from the treatment plant, filed suit against the City in state court for damages caused by raw sewage overflowing into the creek.[16] Then, on February 7, 2001, Ailor and Lynch gave the City notice that they would be filing a lawsuit under the CWA and the Resource Conservation and Recovery Act ("RCRA").[17] Subsequently, on May 16, 2001, Ailor and Lynch filed a federal court claim under the CWA, the RCRA, and Tennessee state law.[18] For relief, the Plaintiffs sought an injunction, compensatory damages, punitive damages, and litigation costs including reasonable attorney's fees.[19]

Once the case was in federal court, the City moved for summary judgment.[20] The City argued that summary judgment should be granted because: (1) the Board's order was complied with; (2) an agency had already initiated suit against the City; and (3) actions brought under the CWA and the RCRA do not provide for compensatory or punitive damages.[21] In response, the Plaintiffs reiterated their claims but did not offer any evidence that the City did not comply with the Agreed Order.[22] The Plaintiffs also failed to provide any evidence that the plant was in violation of its NPDES permit when they filed their claim or when the City made its motion for summary judgment.[23] In its reply to the Plaintiffs' response, the City asserted that the case was moot because the new plant had been operating for more than ten months with no discharges in violation of its NPDES permit.[24]

On November 5, 2001, the district court granted the City summary judgment on the basis that the Plaintiffs' claim was moot because there was no evidence of overflow since November of 2000, and because any relief that the Plaintiffs were entitled to under the CWA had been obtained by the State.[25] The court also dismissed the Plaintiffs' RCRA claims, declined to hear their state law claims, and would not allow them to recover any attorney's fees.[26] One week later, the Plaintiffs filed a motion to alter or amend judgment.[27] The

[10] *Ailor*, 368 F.3d at 591-92.
[11] *Id.* at 592.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 592-93.
[16] *Id.* at 593.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 594.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 594-95.
[26] *Id.*
[27] *Id.*

Plaintiffs argued that the judgment was incorrect for two reasons: (1) the City had admitted to violating its permit since the new plant went on line; and (2) a manhole overflowed on two separate occasions since November, 2000.[28] The district court denied the motion because it felt the Plaintiffs failed to show good cause.[29]

After their motion to alter or amend the judgment was denied, the Plaintiffs appealed to the Sixth Circuit and argued that summary judgment on their CWA claims should not have been granted and that their RCRA claims were improperly dismissed.[30] The Court of Appeals then affirmed the district court and pointed out that the Plaintiffs' claims had both standing and mootness problems.[31] The court found that Plaintiff Ailor lacked standing because he no longer owned the property in question at the time the federal complaint was filed.[32] The court then held that Lynch may not have had standing to sue because her complaint did not clearly allege that the City was currently violating its permit.[33] The court reasoned that even if Lynch had standing, her claim was moot because the state had already obtained the remedy that she was entitled to, and the alleged violations were not likely to recur.[34] The court then held that the RCRA claim was properly dismissed because it was similar to the CWA claim.[35]

III. LEGAL BACKGROUND

A. The Water Quality Act and the Clear Water Act

In 1948, Congress enacted the Water Quality Act ("WQA") in response to growing public concern about the pollution of America's waters.[36] Though it was created to greatly curb water pollution, the WQA ultimately proved to be a failure because it was not restrictive enough.[37] For instance, under the WQA one could still pollute a body of water if it was large enough to dilute the chemical's dangerous effects.[38] In addition, instead of enforcing water quality standards, the WQA primarily provided funding to states to help them develop their own standards and control programs.[39] In effect, the states were running on the honor system and had a lot of discretion in deciding how to classify their waters.[40]

Twenty-four years after the WQA was passed, only half of the states had set water quality standards.[41] Recognizing that the WQA failed to give states any impetus to improve water quality, in 1972 Congress passed the Federal Water Pollution Control Act Amendments, also known as the Clean Water Act ("CWA").[42] The CWA was designed to be much tougher on polluters.[43] In fact, whereas the WQA allowed pollution in a body

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 600.
[32] *Id.* at 597.
[33] *Id.*
[34] *Id.* at 600.
[35] *Id.* at 601.
[36] Martin A. McCrory, *Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication*, 20 STAN. ENVTL. L.J. 73, 79 (2001).
[37] *See id.* at 80.
[38] *Id.* at 81.
[39] *Id.* at 79-80.
[40] *See id.*
[41] *Id.* at 80.
[42] 33 U.S.C. § 1251 (2000).
[43] McCrory, *supra* note 36, at 81.

of water as long as its effects would be diluted, the CWA specifically forbid anyone from polluting navigable waters except under certain circumstances.[44]

The CWA claims that its purpose is to restore and maintain the "chemical, physical, and biological integrity of Nation's waters."[45] One of the most important ways that the CWA attempts to accomplish these goals is by issuing NPDES permits.[46] As previously mentioned, the CWA only allows pollution in certain circumstances. Since some activities that benefit society necessarily involve water pollution, the CWA authorizes the Environmental Protection Agency ("EPA") to issue NPDES permits.[47] These permits allow businesses to discharge certain pollutants within express limitations.[48] In order to ensure that a business is in compliance with its NPDES permit, a permit-holder is required to provide the EPA or a state authority with a monthly report of its discharges.[49] If a business violates its permit by discharging too much of a pollutant, it could face civil and criminal penalties.[50]

B. Citizen Suits

In addition to NPDES permits, another important way that the provisions of the CWA are enforced is through citizen suits. Under the CWA, a citizen can file a civil action in federal court against "any person . . . who is alleged to be in violation of [their NPDES permit],"[51] provided that the citizen gives sixty days notice of his or her intention to sue to the EPA Administrator, the state, and the violator.[52] In a sense, the citizen suit provision of the CWA makes individuals "private attorneys general" by allowing them to sue businesses and governmental agencies to enforce the act.[53] However, citizen suits have restrictions on them as well. For example, a citizen may not bring suit if the EPA Administrator or the state has already done so, nor may he recover for compensatory or punitive damages.[54] In addition, not all citizens may bring a citizen suit under the CWA; only a citizen who has an interest that could be affected by the water pollution may bring suit.[55]

The purpose of the citizen suit provision has been the subject of much debate. Some argue that a citizen suit can be brought only when the EPA Administrator or the state has failed to take any action.[56] Others would like these suits to provide redress to the plaintiff for past violations regardless of what governmental action has been taken.[57] However, the Supreme Court answered the question in 1987 when it stated that the "bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to

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[44] 33 U.S.C § 1311(a). *See also* McCrory, *supra* note 36, at 81.
[45] *Id.* § 1251(a).
[46] *See id.* § 1342.
[47] *Id.*
[48] *Id.*
[49] *Id.* § 1318.
[50] *Id.* § 1319. Any person who knowingly violates an NPDES permit is subject to criminal penalties of up to $50,000 per day. *Id.* § 1319(c)(2)(B). Any person who violates their NPDES permit is subject to civil penalties of up to $25,000 per violation, per day. *Id.* § 1319(d).
[51] *Id* § 1319(a).
[52] *Id.* § 1365(a)-(b).
[53] Bennett v. Spear, 520 U.S. 154, 165 (1997).
[54] 33 U.S.C. § 1365(b)(1)(B). Under an action brought pursuant to the citizen suit provision of the CWA, a court may only award injunctive relief, the assessment of civil penalties to be paid to the U.S. Treasury, and the prevailing party's reasonable attorney's fees. *Id.* § 1365(a), (d).
[55] *Id.* § 1365(g).
[56] *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987).
[57] *Id.* at 55.

supplement rather than to supplant governmental action."[58] Therefore, the purpose of the citizen suit is to act when the government fails to.[59]

Though the Supreme Court has reduced the citizen suit to a supplementary role, more citizen suits have been filed under the CWA than any other environmental statute.[60] In fact, twice as many CWA suits are filed by citizens than by state governments and the national government combined.[61] One author stated:

> Citizens have consistently been the predominant mode of CWA enforcement in federal courts because water violations are usually very apparent, and because citizens who fish, swim, boat, or hike are the first to notice and report incidents [of water pollution]. [. . .] In truth, if citizens did not play such a major role in initiating Clean Water Act enforcement actions, there would be little enforcement, if any.[62]

Therefore, despite being supplemental, the citizen suit has proven to be vital to the success of the CWA. However, though a citizen may have a right to bring a suit under the CWA, he or she must still satisfy the constitutional doctrines of standing and mootness.

C. Standing and Mootness

According to Article III of the Constitution, federal courts only have jurisdiction over cases and controversies.[63] Though nothing in the Constitution speaks of standing or mootness, the Court, in an act of judicial restraint, has ruled that it cannot hear claims where the plaintiff has no stake in the litigation.[64] The concepts of standing and mootness serve to ensure that a plaintiff, had a stake in the suit when the complaint was filed (standing), and continues to have a stake afterwards (mootness). Thus, if a plaintiff lacks standing or his claim becomes moot, a federal court may not hear his claim because there is no case or controversy within the meaning of Article III.[65]

1. Standing

In order to have standing in a lawsuit, a plaintiff must have a sufficient interest in the dispute.[66] The Court has determined that a plaintiff has a legally cognizable interest in a suit if he establishes an injury-in-fact, causation and redressability.[67]

To have an injury-in-fact, the plaintiff must suffer an invasion of a legally protected interest that is both: (1) concrete and particularized; and (2) actual or imminent.[68] In order for an injury to be concrete in a CWA case, the plaintiff must prove that he has directly suffered because of the defendant's pollution; it is not enough

[58] *Id.* at 60.
[59] *See id.*
[60] McCrory, *supra* note 36, at 76.
[61] Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 353 (1990).
[62] McCrory, *supra* note 36, at 76 n.12.
[63] U.S. CONST. art. III, § 2.
[64] McCrory, *supra* note 36, at 86.
[65] *See id.*
[66] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 191 (2000).
[67] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).
[68] *Id.* at 560.

to speculate that the defendant has polluted.[69] However, this direct injury does not have to be a physical one; it may be something such as an aesthetic loss.[70]

To establish causation, the plaintiff must prove that there is "a substantial likelihood" that the defendant caused the plaintiff's harm.[71] In a CWA case, the plaintiff can establish this by showing that the defendant: (1) discharged some pollutant in violation of its NPDES permit; (2) into a waterway in which the plaintiffs have an interest; and (3) that this pollutant causes the kind of injury that the plaintiff has suffered.[72] If the plaintiff's harm is not "fairly traceable" to the defendant, then the plaintiff lacks standing.[73]

The final element of standing is redressability.[74] To meet this requirement the plaintiff must show that it is likely that his or her injury will be redressed by a favorable decision.[75] In a citizen suit under the CWA, the question becomes whether the defendant will stop polluting and thereby injuring the plaintiff if an injunction and/or civil penalties are ordered.[76] The Supreme Court has ruled that civil penalties redress a plaintiff's injury even though they are paid to the U.S. Treasury.[77] The Court based its decision on the argument that civil penalties make it likely that a defendant will either stop polluting, or not pollute again in the future.[78]

Courts have struggled with applying the standing doctrine to citizen suits under the CWA. The CWA allows a citizen to bring a civil action against "any person . . . who is alleged to be in violation of" his or her NPDES permit.[79] Though this statement seems simple, it has proven difficult to determine whether Congress meant that the defendant had to be polluting when the plaintiff filed his complaint or not. Prior to the Supreme Court case *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,[80] there was a split in the circuits over this matter.

In the 1985 case *Hamker v. Diamond Shamrock Chemical Co.*,[81] the defendant's pipeline discharged oil into the plaintiffs' creek.[82] Eleven months later, the plaintiffs filed suit.[83] The court held that it did not have subject matter jurisdiction because the plaintiffs lacked standing.[84] In its decision, the Fifth Circuit stated that "[t]he language of section 1365 and the structure of the [Clean Water] Act convince us that a complaint brought under section 1365 must allege a violation occurring at the time the complaint is filed."[85] The court reasoned that because the violation occurred eleven months before a complaint was filed, the plaintiffs could not bring their suit in federal court.[86]

The Fourth Circuit, however, handled a similar situation differently just a year later in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfiled, Ltd.*[87] In *Chesapeake*, Gwaltney violated its NPDES permit

[69] *See* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 179 F.3d 107, 113-14 (4th Cir. 1999), *vacated*, 204 F. 3d 149 (4th Cir. 2000).
[70] *See Lujan*, 504 U.S. at 562-63.
[71] *See Gaston Copper Recycling Corp.*, 179 F.3d at 115.
[72] *Id.*
[73] *Id.*
[74] *See Lujan*, 504 U.S. at 560.
[75] *Id.* at 561.
[76] McCrory, *supra* note 36, at 110.
[77] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 185 (2000).
[78] *See id.*
[79] 33 U.S.C. § 1365(a) (2000).
[80] 484 U.S. 49 (1987).
[81] 756 F.2d 392 (5th Cir. 1985).
[82] *Id.* at 394.
[83] *Id.*
[84] *Id.* at 398-99.
[85] *Id.* at 395.
[86] *See id.*
[87] 791 F.2d 304 (4th Cir. 1986), *vacated*, 484 U.S. 49 (1987).

numerous times.[88] Its last violation, however, occurred two weeks before the Chesapeake Bay Foundation filed a citizen suit in federal court.[89] The Fourth Circuit held that because the EPA could seek civil penalties under section 309 of the CWA for past violations, section 505(a) of the CWA allowed citizen-plaintiffs to do the same.[90]

When Gwaltney petitioned for a writ of certiorari, the Supreme Court granted it to resolve the issue of whether a citizen has standing to sue for past violations.[91] The Court held that a citizen suit under the CWA could only be brought when the defendant was violating its NPDES permit at the time the complaint was filed.[92] The Court based its judgment on a number of factors, one being the use of the present tense in the Act.[93] Thus, the Court concluded, the CWA does not allow citizen suits for "wholly past violations."[94] The Court did make an exception however, and held that both the CWA and the Constitution would allow a citizen to bring a suit if he or she made a good faith allegation of an "intermittent violation."[95] The Court went on to define an intermittent violation as one where there is "a reasonable likelihood that a past polluter will continue to pollute in the future."[96] Therefore, in order to bring a citizen suit under the CWA and have Article III standing, a defendant must either be polluting when the complaint is filed, or reasonably likely to pollute again in the future.[97]

2. Mootness

Even if a plaintiff establishes standing at the beginning of a lawsuit, his claim can still become moot if subsequent events deprive him of his stake in the suit.[98] In other words, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[99] If a plaintiff loses his stake, his claim is moot and the court must dismiss it because there is no "case or controversy" within the meaning of Article III.[100]

To get a case dismissed as moot when the plaintiff sues for an injunction, defendants often cease their unlawful conduct sometime after the complaint is filed.[101] The rationale is that by stopping the conduct, the plaintiff no longer has a stake in the suit's outcome.[102] This is known as the doctrine of voluntary cessation.[103] The courts have recognized however, that a defendant who stops his unlawful conduct to moot a case can just as easily "return to his old ways" after the case is dismissed.[104] For this reason, a case is only moot by voluntary cessation when the defendant proves that it is "absolutely clear" the wrongful conduct could not reasonably be

[88] *Id.* at 306.
[89] *Id.* at 308.
[90] *Id.* at 316-17.
[91] *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987).
[92] *See id.* at 59.
[93] *See id.*
[94] *See id.* at 60.
[95] *Id.* at 57.
[96] *Id.*
[97] *See id.*
[98] *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997).
[99] U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973). Note that it has been held that a claim for damages seldom becomes moot. Chase v. McMasters, 573 F.2d 1011, 1015 (8th Cir. 1978) (citing Powell v. McCormack, 395 U.S. 486, 495-500 (1969)).
[100] *See Geraghty*, 445 U.S. at 397.
[101] *See generally* McCrory, *supra* note 36, at 114-15.
[102] *See id.*
[103] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 174 (2000).
[104] United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

expected to recur.[105] If, however, the defendant's cessation is forced by a court or the government, the doctrine does not apply and the plaintiff's case will be dismissed as moot.[106]

An issue that has arisen in CWA cases is whether a citizen suit becomes moot when a defendant comes into compliance with its NPDES permit after the plaintiff has filed his claim.[107] The Supreme Court has held that when a citizen files suit solely for an injunction, the case is moot if the defendant-polluter subsequently complies with its NPDES permit and proves that another violation could not be reasonably expected to recur.[108] At one point in time, however, the circuits were split on the issue of whether a citizen's case ever becomes moot if he is seeking civil penalties.[109]

In *Atlantic States Legal Foundation., Inc. v. Stroh Die Casting Co.*, the Seventh Circuit held that a plaintiff's suit for civil penalties does not become moot when the defendant comes into compliance with its NPDES permit.[110] In *Atlantic*, the defendant discharged pollutants into the Milwaukee sanitary sewerage system without the proper permits.[111] After Atlantic filed suit under the CWA, the defendant obtained the required permits.[112] The Court held that while a defendant's post-complaint compliance may moot a suit for an injunction, a citizen can recover civil penalties for any time the defendant was in violation of the law.[113]

The Fourth Circuit, however, took the opposite view in *Friends of the Earth, Inc. v. Laidlaw Environmental Services.*[114] In that case, Laidlaw discharged various pollutants in excess of what was allowed under its NPDES permit.[115] Friends of the Earth then filed suit against Laidlaw under the CWA seeking declaratory and injunctive relief and an award of civil penalties.[116] After litigation, the district court declined to grant any declaratory or injunctive relief but ordered Laidlaw to pay $405,800 in civil penalties.[117] Feeling that this amount was too low, Friends of the Earth appealed to the Fourth Circuit.[118] On appeal, the Fourth Circuit held that a claim for civil penalties alone under the CWA is moot and ordered the district court to dismiss the action.[119] The Fourth Circuit reasoned that because civil penalties are paid to the U.S. Treasury and not the plaintiff, civil penalties cannot redress a plaintiff's injury.[120] Therefore, the court held that the case was moot.[121]

The Supreme Court granted Friends of the Earth a writ of certiorari to resolve the split in the circuits.[122] The Court first noted that the Fourth Circuit in *Laidlaw* had confused the concepts of standing and mootness and proceeded to analyze redressability as a standing issue.[123] Satisfied that civil penalties do redress a plaintiff's injury, the Court proceeded to hold that even if a plaintiff's sole claim is for an award civil penalties, his claim does not automatically become moot if a defendant comes into compliance with its NPDES permit.[124]

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[105] *Id.* (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 448 (2nd Cir. 1945)).
[106] *See* Comfort Lake Ass'n v. Dresel Contracting, Inc., 138 F.3d 351, 355 (8th Cir. 1998).
[107] *See generally* McCrory, *supra* note 36, at 114.
[108] *See Gwaltney*, 484 U.S. at 66-67. This is also true whenever the defendant is forced to comply with its NPDES permit. *See id.*
[109] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180 (2000).
[110] *See* 116 F.3d 814, 820 (7th Cir. 1997).
[111] *Id.* at 816.
[112] *Id.* at 817.
[113] *Id.* at 820.
[114] 149 F.3d 303 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000)..
[115] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 176 (2000).
[116] *Id.* at 177.
[117] *Id.* at 178.
[118] *Id.* at 179; Friends of the Earth did not appeal the denial of declaratory or injunctive relief. *Id.*
[119] *See id.*
[120] *Id.*
[121] *See id.*
[122] *Id.* at 179-180.
[123] *See id.* at 180, 708. In its holding, the Court pointed to the deterrent effect that penalties have on polluters. *Id.* at 185-186.
[124] *See id.* at 193. The Court noted that this is true even when a district court has ruled that an injunction is unnecessary. *Id.*

In its reasoning, the Court argued that an award of civil penalties may deter a polluter from future violations and therefore the plaintiff still maintains an interest in the lawsuit.[125] Thus, where a citizen-plaintiff seeks an injunction or an award of civil penalties under the CWA, a defendant's voluntary cessation will not moot either claim unless the defendant proves that its wrongful conduct could not be reasonably expected to recur.[126]

IV. INSTANT DECISION

After the district court granted the City's motion for summary judgment and denied the Plaintiffs' motion to alter or amend judgment, the Plaintiffs appealed to the Sixth Circuit.[127] The court of appeals affirmed the judgment of the district court while another judge concurred in part and dissented in part.[128]

Although the district court ruled that the Plaintiffs' CWA claims and RCRA claims were moot, the Sixth Circuit quickly pointed out that these claims implicated two distinct justiciability problems: standing and mootness.[129] The court began its analysis by determining whether both plaintiffs had standing to bring their CWA claims.[130] The court first stated that "standing concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct 'was occurring at the time the complaint was filed.'"[131] The court then narrowed the issue to whether the City was violating its NPDES permit at the time the Plaintiffs filed their federal complaint.[132]

In deciding this issue, the court quickly concluded that but for the plant's four minor permit violations in February, March and May of 2001, neither Plaintiff would have standing.[133] As to Plaintiff Ailor, the court found that he "clearly" lacked standing regardless of these minor violations because he did not own the property in question at the time the federal complaint was filed.[134] The court then turned its attention to Lynch.[135] After looking at the Supreme Court case *Gwaltney of Smithfield v. Chesapeake Bay Foundation*,[136] the court held that, in order to establish the "to be in violation" element of standing, a citizen-plaintiff must either allege that the defendant was violating the CWA at the time the complaint was filed, or make a good faith allegation that it is reasonably likely that the defendant will violate the CWA again in the future.[137] In applying *Gwaltney* to the facts of the case, the court held that Lynch did not allege that the City was violating the CWA at the time the complaint was filed because she filed suit several weeks after the plant's last recorded violation.[138] The court also held that Lynch "in essence" lacked standing because she filed suit after the City spent over 1 million dollars to comply with its NPDES permit.[139] However, the court decided to "give Lynch the benefit of the

[125] *See id.* at 185-186.
[126] *See id.*
[127] Ailor v. City of Maynardville, 368 F.3d 587, 595 (6th Cir. 2004).
[128] *Id.* at 601-02.
[129] *Id.* at 596.
[130] *Id.*
[131] *Id.* (quoting NAACP v. City of Parma, 263 F.3d 513, 525 (6th Cir. 2001)). The court went on to note that a plaintiff establishes standing by demonstrating (1) an injury in fact (2) that is fairly traceable to the defendant's action and (3) is likely to be redressed by a favorable decision. *Id.*
[132] *Id.*
[133] *Id.* at 596-97.
[134] *Id.* at 597 n.5.
[135] *Id.* at 597.
[136] 484 U.S. 49 (1987).
[137] *Ailor*, 368 F.3d at 597-99 (citing *Gwaltney*, 484 U.S. at 57, 64).
[138] *Id.* at 598.
[139] *Id.* at 599.

doubt" and grant her standing by assuming that her complaint alleged in good-faith that the City would continue to pollute in the future.[140]

The Sixth Circuit then turned to the issue of whether Lynch's CWA claim was moot.[141] The court noted that a case is moot when, after the filing of a lawsuit, events deprive a plaintiff of his or her legal "interest in the outcome of the litigation."[142] The court then stated that a party is deprived of his legal interest when a defendant voluntarily stops the offending conduct and carries the "heavy burden" of "mak[ing] it absolutely clear that" the conduct "could not be reasonably expected to recur."[143] In its analysis of this rule, the court agreed with the district court's finding that Lynch no longer had a legal interest in the case because no overflow into Bull Run Creek had occurred since the new plant opened in November, 2000.[144] In addition, the court held that the City had met its "heavy burden" by presenting undisputed evidence that, at the time summary judgment was granted, the City was in compliance with its NPDES permit and that any alleged violations were largely due to the old wastewater plant.[145] The court further reasoned that the Plaintiffs, as a nonmoving party opposing a summary judgment motion, had their chance to prove that their case was not moot, but failed to offer any evidence that the plant was likely to overflow into Bull Run Creek again.[146] The court then held that the Plaintiffs were not entitled to attorney's fees because they never had a valid claim under the CWA.[147] The court also ruled that the Plaintiffs' RCRA claims were properly dismissed because they were substantially similar to the CWA claims.[148]

In a separate opinion, concurring in part and dissenting in part, Judge Cole agreed with the majority that Ailor lacked standing, but he felt Lynch's claim was not moot and that she was entitled to reasonable attorney's fees.[149] Cole stated that a genuine issue of material fact still existed because the City failed to make it "absolutely clear" that its alleged violations would not recur.[150] He then noted that though the City improved its wastewater treatment plant, its improvement fell short of the required "absolutely clear" standard, and that there was evidence that the violations would continue.[151]

V. COMMENT

Citizen suit provisions in environmental statutes are designed to encourage enforcement of those statutes, making citizen-plaintiffs "private attorneys general."[152] As mentioned previously, more citizen suits have been filed under the CWA than any other environmental statute,[153] and twice as many CWA suits are filed by citizens than by the government.[154] These statistics show the importance of citizen suits and that perhaps, without them, there would be little if any enforcement of the CWA.[155] This is because citizens, not

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[140] *Id.*
[141] *Id.*
[142] *Id.* at 596.
[143] *Id.* at 595-96 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180 (2000) (internal citation omitted)).
[144] *Id.* at 599.
[145] *Id.* at 599-600.
[146] *Id.* at 600.
[147] *Id.* at 601.
[148] *Id.*
[149] *Id.* at 601-02.
[150] *Id.*
[151] *Id.*
[152] *See* Bennett v. Spear, 520 U.S. 154, 165 (1997).
[153] McCrory, *supra* note 36, at 76.
[154] Greve, *supra* note 61.
[155] McCrory, *supra* note 36, at 76.

governments, feel the practical effects of water pollution such as having to think twice about whether to go fishing or swimming.

If citizen suits are so vital to the success and the enforcement of the CWA, why do courts seem to apply the doctrines of standing and mootness in a way that keeps these important cases from being heard? For instance, in *Ailor*, though the Plaintiffs estimated that their property damage from the water pollution amounted to $750,000, the court held that Plaintiff Ailor "clearly" lacked standing[156] and that Plaintiff Lynch "in essence" lacked standing.[157] Even assuming that the $750,000 number is exaggerated, it is difficult to imagine how a plaintiff can incur hundreds of thousands of dollars of property damage and still lack a legally cognizable interest in a CWA claim. Can we have the best of both worlds? That is, can the courts allow these kinds of suits to be heard and still be true to the constitutional doctrines of standing and mootness?

The answer is yes. In fact, the rules of standing and mootness themselves provide courts with some leeway in their application. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, the Supreme Court held that a citizen has Article III standing to bring suit under the CWA if the defendant is polluting when the complaint is filed.[158] However, the Court also held that a citizen has standing if he or she has made a good faith allegation of an "intermittent violation." That is, if there is "a reasonable likelihood that a past polluter will continue to pollute in the future."[159] Thus, in order for a citizen to have standing in a CWA suit, the court merely has to find that the plaintiff has alleged that it is likely that the defendant will pollute again in the future.[160] As the rule is phrased, it seems that courts have a lot of discretion in determining whether a plaintiff has made such an allegation. For instance, in a case where a pleading does not make it entirely clear whether a plaintiff has much such an allegation, a court has enough flexibility with the ambiguous language to find standing or not.

An equal amount of discretion is also available to a court in analyzing whether a claim is moot by a defendant's voluntary cessation. In *Gwaltney*, the Court stated that when a defendant seeks to have a case dismissed as moot because he has ceased his wrongful conduct, he carries the "heavy burden" of proving that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[161] No doubt the key term in this rule is the phrase "absolutely clear."[162] However, "absolutely clear" is a vague standard. While there has been little guidance on the subject, perhaps the words "absolutely clear" were intended to be ambiguous in order to allow courts some freedom of interpretation. Therefore, just as it appears that courts have discretion in determining whether an "intermittent violation" has been alleged by a citizen-plaintiff, it also appears that courts have some discretion in determining whether a defendant has made it "absolutely clear" that his wrongful behavior won't recur. If the CWA citizen suit provision is intended to allow citizens to enforce the act, courts should construe a complaint liberally to find that a plaintiff has alleged an "intermittent violation" in order to find standing and should strictly require that the defendant has made it "absolutely clear" that he will not pollute again so a plaintiff's claim will not become moot.[163]

In *Ailor v. City of Maynardville*,[164] the Sixth Circuit had an opportunity to make sure that the doctrines of standing and mootness would be applied in citizen-friendly way. In regards to standing, the court was true to the spirit of a citizen suit. For instance, the court found that Plaintiff Lynch had standing by giving her "the benefit of the doubt" and liberally interpreting the complaint in such a way as to find that she had alleged

[156] *Ailor*, 368 F.3d at 597 n.5.
[157] *Id.* at 598.
[158] *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 57 (1987).
[159] *Id.*
[160] *See id.*
[161] *Id.* at 66 (quoting United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)).
[162] *Id.*
[163] *Id.*
[164] 368 F.3d 587 (6th Cir. 2004).

intermittent violations.[165] When the court addressed the mootness issue, however, it was not as citizen-friendly. Though the court had just granted Lynch standing, it then turned around and mooted her case by finding that the City had met its "heavy burden" of making it absolutely clear that its wrongful behavior could not reasonably be expected to recur.[166] As the dissenting judge pointed out, the court had found it was "absolutely clear" that City the would not repeat its conduct despite three pieces of evidence: 1) the fact that the City itself had admitted concerns about its "collection system rehabilitation program;" 2) the fact that the City had produced a recent report that warned of increased sewage flows; and 3) the fact that the City had been in chronic violation of NPDES permit for years.[167] Thus, just as the dissenting judge reasoned, the court could have just as easily interpreted the "absolutely clear" standard more strictly to find that Lynch's claim was not moot.[168]

VI. CONCLUSION

There is no doubt that the courts have a responsibility to uphold the constitutional doctrines of standing and mootness; these doctrines cannot be disregarded without violating Article III's "case or controversy" requirement. However, if the citizen-suit provision of the CWA is intended to encourage citizens to enforce the act, the courts also have a responsibility to respect Congress' intent by doing what they can to get these claims into the courts. As the rules stand now, the courts can do two things without compromising standing and mootness: 1) the courts can liberally construe a complaint to find that a plaintiff has alleged an "intermittent violation;" and 2) the courts can strictly interpret the requirement that the defendant has made it "absolutely clear" that his conduct could not reasonably be expected to recur. If these two things are done, we can have the best of both worlds; the doctrines of standing and mootness will be upheld while the purpose citizen-suits will be furthered.

BEN MCINTOSH

[165] *Id.* at 599.
[166] *See id.* at 600.
[167] *Id.* at 602.
[168] *See id.*

COURT REPORTS

UNITED STATES SUPREME COURT

BedRoc Ltd., v. United States, 541 U.S. 176 (2004).

The United States Supreme Court held that sand and gravel were not "valuable minerals" reserved for the government under the Pitman Underground Water Act of 1919.

BedRoc Limited, LLC, and Western Elite, Inc. filed an action to quiet title to the sand and gravel on 560 acres of land north of Las Vegas, Nevada. Originally owned by the United States, this land was patented in the 1940's under the Pitman Underground Water Act of 1919. BedRoc's action was filed in response to the Bureau of Land Managements interpretation of the Pitman Act's reservation of "valuable minerals" as including substances such as sand and gravel. The BLM based its decision primarily on Supreme Court precedence, which held that gravel was a mineral reserved to the United States under the Stock-Raising Homestead Act of 1916. The district court granted summary judgment in favor of the government. On appeal with the United States Court of Appeals for the Ninth Circuit, the court affirmed, relying primarily on the Act's legislative history and Supreme Court precedence.

The United States Supreme Court reversed the Ninth Circuit decision, with the plurality holding that sand and gravel are not valuable minerals as contemplated by the Pittman Act. This decision was based primarily on the modifier "valuable" twice applied to the word mineral in the Pittman Act. The plurality's textual approach found that the modifier "valuable" created a narrower reservation of minerals for the United States than the reservation examined in previous cases. As such, the Court was able to refrain from overruling its previous decision, while providing an outcome largely in opposition to its past reasoning. The dissent noted that the plurality's decision was in direct conflict with the legislative history of the Pittman Act, and that the holding served only to create ambiguity. The plurality responded that the unambiguousness of the statutory language made resorting to legislative history unnecessary.

JAY D. HASTINGS

Department of Transportation v. Public Citizen, 541 U.S. 752 (2004)

In a case that created strange bedfellows, various environmental groups and the Teamsters banded together to prevent Mexican truck carriers from entering the United States. They objected to the Federal Motor Carrier Safety Administration's (FMCSA) failure to do an Environmental Impact Statement (EIS) on the effect of its new regulations pertaining to Mexican carriers. The FMSCA, a division of the Department of Transportation, was charged with promulgating new regulations after a moratorium banning Mexican Truck Carriers was lifted. The ban had been in effect since 1982 when Congress placed a two-year moratorium on the certification of truck carriers domiciled in Mexico and Canada over concern about unfair treatment of American truck carriers. Congress gave the President the power to extend the moratorium if he determined that doing so would be in the national interest. Although the Canadian moratorium was allowed to expire after the allotted two-year period, the blanket denial of Mexican certification remained in effect indefinitely. In 1992, the leaders of the United States, Mexico and Canada signed the North American Free Trade Agreement (NAFTA). As part of the agreement, the United States agreed to slowly phase out the moratorium on Mexican truck carrier certification by January 2000. The President did begin to allow some licensing for Mexican bus carriers, but the majority of Mexican carriers still could not receive certification by the time the January 2000 deadline passed. Mexico brought an action under the provisions of NAFTA in order to have the moratorium lifted. An

international arbitration panel found that the United States was in violation of the treaty and compelled the United States to comply.

In November 2002, the moratorium was lifted. Shortly before the ban was lifted, plaintiffs petitioned for judicial review of the new FMSCA regulations asserting that they violated both NEPA and the Clean Air Act. The Ninth Circuit Court of Appeals agreed with the petitioners and set aside the rules. The appellate court found that the FMCSA had not given adequate consideration to the environmental effects of lifting the moratorium. In fact, the FMSCA had promulgated regulations as if the moratorium was to remain in effect. Since it was foreseeable that the President was going to rescind the moratorium, the Ninth Circuit held that the FMSCA should have taken this into account.

The Supreme Court disagreed with the lower court's analysis. It held that the petitioners made no showing that the FMCSA's decision not to prepare an EIS was arbitrary and capricious, and, as such, the regulations must be upheld. The petitioners argued that the FMCSA's reasoning was flawed because it did not take into account the lifting of the moratorium. The Court quickly rejected this argument, ruling that the FMCSA had no control over the moratorium and it could not be expected to take it into account for the purpose of complying with NEPA. The court focused on the fact that it was the President's decision to lift the Moratorium, and that FMSCA had no control over whether or not Mexican trucks would enter the United States. The FMSCA was merely charged with developing a regulatory scheme, not with assessing the environmental effects of trucks entering the country. The Court did not clarify whose shoulders that responsibility would fall on, or if this holding scaled back the EIS requirement under NEPA.

JON MORROW

Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004)

In *Norton v. Southern Utah Wilderness Alliance* the Supreme Court was faced with the issue of whether the authority of a federal court under the Administrative Procedure Act ("APA") to compel agency action that is unlawfully withheld or unreasonably delayed extends to planning documents of the Bureau of Land Management. The Supreme Court held that that land use plans are not legally binding commitments enforceable under 5 U.S.C. § 706(1).

The Bureau of Land Management created land use plans for the San Rafael area and the Henry Mountains area in Utah. San Rafael and Henry Mountains are included in 2 million acres of Utah that were recommended for wilderness designation. These two areas are open to off-road vehicles which allegedly caused negative environmental consequences such as soil erosion and compaction, harassment of animals, and annoyance of wilderness lovers.

Due to these environmental concerns, Southern Utah Wilderness Alliance filed an action in the District Court of Utah against the Bureau of Land Management. Southern Utah Wilderness Alliance believed the Bureau: (1) failed to act pursuant to the Federal Land Policy and Management Act, which states that lands should be managed in such a manner as not to impair its suitability for preservation as wilderness until Congress acts upon the recommendation; (2) failed to implement provisions regarding ORV use in the land use plans; and (3) failed to take a "hard look" pursuant to the NEPA, at whether it should perform supplemental environmental analysis for areas with ORV use. In order to remedy these failures Southern Utah Wilderness Alliance sued pursuant to the APA provision providing a cause of action to "compel agency action unlawfully withheld or unreasonably delayed."

The District Court dismissed all three claims. The Tenth Circuit Court of Appeals with a divided panel reversed. The court concluded that the Bureau's non-impairment obligation is a mandatory and nondiscretionary duty, and, thus, the Bureau could be compelled to comply. Using similar reasoning, the Tenth

Circuit Court of Appeals reversed the dismissal of the land use plan claim and the NEPA claim. The United States Supreme Court granted certiorari and reversed the Court of Appeals' judgment and remanded the case.

According to the Supreme Court, it was unnecessary to consider whether the action envisioned by the land use plan was sufficiently discrete to be compelled under the APA. As to the NEPA claim the Supreme Court found no ongoing "major Federal action" requiring supplementation. In reversing the judgment, the Supreme Court held that the Bureau's statement to conduct "use supervision and monitoring" in designated areas in the Henry Mountains area land use plan were not a legally binding commitment enforceable under the APA.

LAURIE KNIGHT

UNITED STATS COURT OF APPEALS

Morris v. United States, 392 F.3d 1372 (Fed. Cir. 2004)

Robert E. Morris and Carol L. Morris ("plaintiffs") brought suit against the United States alleging that the regulatory provisions of the Endangered Species Act ("ESA") constituted a taking compensable under the Fifth Amendment.

In 1995, the plaintiffs purchased a half-acre lot adjacent to the Eel River in Humboldt County, California. After several years, the plaintiffs wanted to harvest six large old-growth redwood trees growing on the property. In compliance with the ESA, the plaintiffs contacted the National Marine Fisheries Service ("NMFS") to determine whether harvesting the trees would violate the ESA by interfering with the behavioral patterns of fish in the Eel River. After visiting the plaintiffs' property, the NMFS determined that the plaintiffs needed to obtain an Incidental Take Permit ("ITP") before harvesting the trees. This permit allows the "taking" of certain listed species if such taking is incidental to an otherwise lawful activity. The plaintiffs investigated the costs of filing the application, but concluded that the costs (allegedly over $10,000) were greater than the value of the trees, or their property (purchased for $2,500).

The United States moved to dismiss, claiming that the plaintiffs' claim was unripe because they had never applied for an ITP, and consequently, the government never took a final action restricting the use of the property. The Court of Federal Claims agreed, holding that the plaintiffs must at least make an application for an ITP before their claim can ripen.

On appeal, the plaintiffs' argued that their claim was ripe for review because the cost of the permitting process was greater than the value of their property. The plaintiffs' also conditionally challenged the Court of Federal Claims' decision on procedural grounds. They argued that if the Court of Federal Claims dismissed their claim on the premise that their allegations of the cost of the permitting process were inaccurate, the court erred because it was required to accept their factual allegations as true. In response, the United States argued that the plaintiffs' claim was unripe because the plaintiffs made no attempt to use the available permitting procedure. With respect to the plaintiffs' conditional claim, the United States argued that the condition was not met because the plaintiffs' claim was dismissed for not filing an application, not because the court disbelieved the plaintiffs' allegations concerning the cost of the application. Finally, the United States argued that even if the court had decided the case on the grounds the plaintiffs suggested, the decision was proper because the court was not bound to accept all of the allegations in the complaint as true, and the court could have look beyond the pleadings to determine whether it had jurisdiction.

In determining whether the plaintiffs claim was ripe, the Federal Circuit addressed the plaintiffs' claim that the ITP permitting process would cost over $10,000. The court found that it was incorrect for the plaintiffs to assume that this cost was either fixed or knowable because the plaintiffs were not taking into account the

agency's discretion in assisting the plaintiffs in the application process. The court noted that the plaintiffs' own counsel had conceded that the agency had discretion in determining what steps the plaintiffs needed to take. The court ultimately held that because the plaintiffs had not allowed NMFS to exercise its discretion, or to make a final agency decision, their claim was not ripe as a matter of law.

LINDSAY COUNTE

Carus Chemical Co. v. EPA, 2005 U.S. App. LEXIS 389 (D.C. Cir. 2005)

Carus Chemical Company ("Carus") sought review of the Environmental Protection Agency's ("EPA") decision to place a site partially located on Carus' property on the National Priorities List ("NPL"). The NPL is a list of hazardous waste sites that need priority cleanup. The Carus property was used as a smelter and rolling mill for more than a hundred years before Carus purchased the property. During that time period, slag piles accumulated on the property and in the adjacent Little Vermillion River. The Environmental Protection Agency believed the slag piles were a threat to human health.

Under CERCLA, the EPA must compile a list of priority sites for hazardous cleanup throughout the country. To help determine which sites qualify for the NPL, the EPA developed the Hazard Ranking System ("HRS"). First, the EPA uses the HRS to identify the source of contamination at a site, the hazardous substances generally associated with the source, and the possible pathways threatened by the hazardous substance. There are four possible pathways for each site to be evaluated: (1) soil exposure; (2) air migration; (3) ground water migration; and (4) surface water migration, the relevant pathway in this case. After evaluating the hazardous substances located at the site, the EPA calculates a threat score for the threatened pathway. Any site with a total score over 28.5 is eligible for the NPL.

Following the method set forth in the HRS, the EPA scored the surface water migration of the Carus site. The EPA discovered various hazardous substances at the site, including: cadmium, copper, lead, nickel, and zinc. To determine the toxicity factor for the cadmium, the EPA used the toxicity factor value corresponding with exposure through inhalation (rather than ingestion), even though inhalation was unlikely to occur at the site. Using this method of exposure, the EPA valued the total toxicity score of the site at 50. The court found the EPA's evaluation of the site was proper because the EPA consistently uses the highest toxicity value when calculating a total threat score.

After finding the EPA's scoring appropriate, the court addressed Carus' claim that the EPA relied on outdated data to determine the toxicity value. Carus argued that the data collected at the site in 1991 and 1993 was outdated and more recent samples show that the EPA incorrectly listed the site. However, the EPA reviewed the more recent samples and found the samples consistent with the total score of the site. Carus further argued that the slag piles were highly resistant to further leaching, there were other remedial alternatives, and that the EPA overstated the environmental and health risks posed by the site.

The court found that Carus Chemical Company failed to show that the EPA incorrectly determined the toxicity score of the site, and that the EPA relied on outdated information in reaching its decision to list the site on the NPL. Based on those findings, the court denied Carus Chemical Company's petition for review of the EPA's decision.

CRYSTAL HERMANN

Horn Farms v. Hohanns, 2005 U.S. App. Lexis 1639 (7th Cir.)

16 U.S.C. §3812-24 was enacted in 1985. This statute was dubbed the "Swampbuster" because under the statute farmers who converted wetlands lost federal subsidies. The loss was proportional to the amount of wetland converted for agricultural use. In 1990, an amendment prevented federal agricultural subsidies from going to any farmer who converted wetlands. In 1996, an additional amendment was passed which added an exception for wetlands that had previously been drained and farmed, had reverted to wetland status, and then were restored to agricultural use.

In 1998 Horn Farms drained around 6.2 acres of wetlands which had previously been drained and converted to farm use. Although the date of the first conversion from a wetland to a farm cannot be determined exactly, Horn Farms concedes it was prior to December 23, 1985. Horn Farms was ineligible for the 1996 exception and lost all federal subsidies because the Department of Agriculture interpreted "after that date" to refer to December 23, 1985.

Horn Farms, however, argued they should not lose federal subsidies because "that date" means the date of the original conversion. They argue any wetland converted to farm use before December 23, 1985 can be farmed again without loss of federal subsidy regardless of its status on December 23, 2005. The federal district court agreed and directed the Department to resume subsidy payments.

The Seventh Circuit reversed and remanded the district court's ruling regarding subsidy payments. The Seventh Circuit found that the Secretary's interpretation of "that date" as December 1985 is the most sensible and is reasonable. December 1985 is the proper interpretation because December 23, 1985 is the last antecedent of "that date," the date on which a wetland was "previously identified" is meaningless for land converted prior to December 1985 when the approach to identifying wetlands came into existence. Further, the date of the original conversion is implausible because such an interpretation would make much of the remaining language functionless. Additionally, the Seventh Circuit held the interpretation is proper because if "that date" was interpreted as the time of original conversion the legislation would allow a reduction of wetlands following the enactment and would allow them in ways that would be difficult to police.

Finally, the district court stated the legislation offends the due process clause of the Fifth Amendment. The Seventh Circuit disagreed, and noted that the district court should not have ruled on the statute's constitutionality, and, further, the district court's constitutional analysis lacked the force precedence.

ANNE E. KERN

Heartwood, Inc. v. U. S. Forest Service, 380 F.23d 428 (8th Cir. 2004)

Heartwood, Inc. filed suit against the United States Forest Service ("USFS") and the United States Fish and Wildlife Service ("FWS") over the approval of the Eastwood II Project. This project involved plans to harvest timber from several sites in the Mark Twain National Forest. At the heart of the controversy was the protection of the endangered Indiana bat, which resides in parts of the Mark Twain National Forest. The USFS prepared an environmental assessment of the project. After making a Finding of No Significant Impact (FONSI) with regard to the Eastwood II project, the agency did not prepare an environmental impact statement. The USFS also consulted with the FWS concerning the project's impact on the endangered Indiana bat. Both agencies concluded in August 2001 that the impact of the project would not jeopardize the existence of the Indiana bat.

The district court in this case granted summary judgment for the USFS and the FWS. Heartwood appealed to the Eighth Circuit. It argued the USFS had violated the National Environmental Policy Act ("NEPA") because it failed to issue an environmental impact statement for the Eastwood II project. Heartwood

also argued the agency had violated the Endangered Species Act ("ESA") by not considering the best scientific data available. Heartwood believed further study of the area was required because endangered Indiana bats had been found near the project area in May of 2004.

The Eighth Circuit held that the USFS of failing to issue an environmental impact statement was not arbitrary and capricious. The court found that the USFS had taken a hard look at the Eastwood II project and its potential impacts by considering several factors including whether the project was highly controversial, the unique characteristics of the project area, and the effect the project would have on endangered or threatened species in the area. Thus, the findings of the USFS supported the FONSI, and no environmental impact statement was required. The court also found that the length of the environmental assessment did not determine whether an environmental impact statement was necessary. Heartwood argued that a Council on Environmental Quality document supported the idea that an environmental assessment longer than fifteen pages signaled an environmental impact statement should be filed. The court pointed out this document was not a regulation and therefore was not binding on the court.

The Eighth Circuit also held the USFS was not arbitrary and capricious with regard to ESA. Heartwood argued the USFS violated ESA by not using the best scientific and commercial data available. Heartwood argued that more surveys of the project area were necessary due to the discovery of an Indiana bat colony in May 2004. The court determined that the best scientific data requirement did not mean that an agency had to conduct new surveys or tests. The rule, as read by the court, required the USFS to consider all existing information available that was relevant to the project. However, the court noted that if more information should become available about the Indiana bat the USFS would be required to reevaluate its findings and possibly adjust the project.

MARISSA L. TODD

United States v. Templeton, 378 F.3d 845 (8th Cir. 2004).

From 1998 to 1999, Rush Templeton leased and operated a restaurant and bar known as The Tavern. The Tavern was located at Venetian Harbor, Inc. (VHI), a marina on the Mississippi River near Portage Des Sioux, Missouri. The tavern itself sat on a 166-foot towboat, the Frank C. Rand (Rand), which was moored at VHI. The towboat was purchased and repaired by VHI and moored approximately fifteen feet from the shore, secured by two poles and attached by eighteen removable bolts. The barge's radar and smokes stacks were intact, but the Rand's engines were inoperable. Numerous alterations to the Rand were made, including the addition of a new sewage system which used the barge's old air tanks as sewage tanks. While two waste discharge pipes allowed licensed waste haulers to pump out waste from the Rand and restaurant, waste from the barge was routinely discharged into the river between one to three times per week.

In the Fall of 1999, Special Agent Andrew McFarlane of the United States Environmental Protection Agency (EPA) began an investigation of alleged dumping from the Rand. The investigation resulted in indictments under the Clean Water Act (CWA) for knowingly discharging pollutants and for conspiring to discharge pollutants illegally. Templeton was convicted following a jury trial before the United States District Court for the Eastern District of Missouri.

On appeal, the key issue was the term "vessel" as used in the CWA. The Eighth Circuit found the Rand to be a towable vessel capable of use and not subject to the criminal penalties under the CWA, and therefore, reversed the convictions. Sewage from "vessels" does not qualify as a pollutant under the CWA, and the Eighth Circuit applied the traditionally broad definition of "vessel." Several circuits have examined the term "vessel" in respect to legislation such as the Longshoremen's and Harbor Workers' Compensation Act and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). The court

noted how the First, Second, and primarily the Fifth Circuit, have followed the traditionally broad definition, the "capable of use" definition.

Despite being moored to the shore, and only being incapable of transporting anyone or anything over the water, except via towing, the Eighth Circuit relied on this expansive definition to reverse the convictions. The court held that any residual capacity, no matter how inefficient, expensive, or impractical was enough to define the Rand as a "vessel," and any waste from The Tavern falls under the "vessel" exception.

JOHN R. GRIFFITH

UNITED STATES DISTRICT COURTS

St. Bernard Citizens for Environmental Quality, Inc. v. Chalmatte Refining, L.L.C., 2005 U.S. Dist. Lexis 1605 (E.D. La. 2005)

The United States District Court for the Eastern District of Louisiana had before it a motion for summary judgment on the issue of standing for two nonprofit environmental organizations suing a local refinery pursuant to the citizen suit provisions of the Clean Air Act, 42 U.S.C. § 7604(a), and the Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11046(b)(1).

The St. Bernard Citizens group was established in part to protect "the organization's members and other St. Bernard Parish residents from pollution coming from the surrounding petrochemical industry." Similarly, the Louisiana Bucket Brigade stated that one of its purposes was to address "environmental health and justice issues in Louisiana." The interests sought to be protected are thus, directly related to the organizational purpose. In this case, neither monetary damages nor relief limited to a single person nor group was sought, individual members of the organizations were not required to participate.

Plaintiffs submitted affidavits of their members demonstrating that odors, petroleum deposits and the constant presence of soot on their property, coming from Chalmette, had prevented the enjoyment of their property, forced them indoors and caused a health concerns. Plaintiff's asserted that the smells came when the wind blew from Chalmette's direction, which they had been told such by Chalmette personnel, that their observations were supported by EPA determinations and that Chalmette had 34 previous emissions violations. Although Chalmette argued that the plaintiffs had to show that there was no other source to demonstrate that their injury was fairly traceable, the court held that a "substantial likelihood" was all that was required. As to redressability, plaintiffs sought injunctive and civil penalty remedies which they claim can prevent the recurrence of the repeated injury and unless such remedies are granted, a "there is a real threat that such violations will continue to occur." Thus, the court reasoned that injunctive relief as well as civil penalties are appropriate to redress the injuries by encouraging Chalmette to discontinue the current violations and ensure they do not recur.

As such, the court granted plaintiffs' motion for summary judgment based on the un-contradicted assertions of the plaintiffs in addition to un-rebutted evidence by Chalmette.

JOSHUA N. CORMAN

STATE COURTS

Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004)

Joseph and Linda Gacke have resided on their farmstead since 1974. In 1996, Pork Xtra, L.L.C. ("Pork Xtra") built two hog confinement buildings across the road about 1300 feet north of the Gacke's home. As a result of these hog confinement facilities, the Gacke's endured offensive odors that caused breathing difficulties for the Gacke's and their visitors.

The Gackes filed a nuisance suit against Pork Xtra on June 13, 2000, claiming diminution of their property value and emotional distress. Pork Xtra an affirmative defense under Iowa Code section 657.11(2), which gives nuisance immunity to animal feeding operations. The trial court found this provision to be an unconstitutional taking of private property without just compensation, and, as a result, rendered judgment in favor of the Gackes. The trial court awarded the Gacke's damages for the decreased value of their property, and for personal damages caused by Pork Xtra's hog confinement facilities.

On appeal, the Supreme Court of Iowa affirmed the nuisance immunity provision as unconstitutional, finding it violated two sections of the Iowa Constitution. The court held that section 657.11 "deprive[d] property owners of a remedy for the taking of their property resulting from a nuisance created by an animal feeding operation," and was an unreasonable exercise of police power. Furthermore, the court found that Pork Xtra's hog confinement facilities significantly impaired the Gacke's use and enjoyment of their property. *Id.* at 171. If Pork Xtra were granted nuisance immunity the Gackes would have no remedy against damages already incurred.

The court stated that in order to be consistent with legislative intent, limited effect could be given to section 657.11(2). Doing so applies the statute in a way that does not constitute an unconstitutional taking without just compensation. In creating nuisance immunity for hog confinement facilities, the legislature "sought 'to protect and preserve animal agricultural production operations' in Iowa by sheltering them from the costs of nuisance lawsuits." *Id.* at 175. This intent is still effectuated by limiting nuisance immunity, and only requiring animal operations to pay for the "easement" created from the nuisance. As a result, the economic burdens of nuisance suits brought against animal operators are lessened, which materializes the legislature's intent. Although the court found this statute unconstitutional, it reversed because of prejudicial error at the trial court level resulting from the admission of certain hearsay evidence.

HALEY PEERSON